BLANK
PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1223~~ 102

In the Matter

—of—

RICHARD HOWARD JONES, An Attorney,

Respondent-Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

JOHN G. BONOMI
Attorney for Appellee
The Association of the Bar
of the City of New York

RAYMOND P. WHEARTY
Of Counsel

BLANK
PAGE

INDEX

	PAGE
Preliminary Statement	2
ARGUMENT	
I. Appellant's appeal herein is not within the jurisdiction of this Court because not taken in conformity to Revised Rule 13, subdivision 1, of this Court	4
II. The appeal herein presents no substantial federal questions	7
III. The judgment below, as to which the New York Court of Appeals entered its order of dismissal which is here on appeal, rests on an adequate non-federal basis	20
CONCLUSION	22

AUTHORITIES CITED:

Cases:

Anonymous No. 2, Matter of, 7 A. D. 2d 735	17
Anonymous No. 14, Matter of, 7 A. D. 2d 735	17
Bannon v. Bannon, 270 N. Y. 484, 492-493	11
Barrows v. Johnson, 346 U. S. 249	14
Broome, Matter of, 13 A. D. 2d 657, reversed on other grounds 10 N. Y. 2d 942 (other citations not applicable)	11

PAGE

Chait v. Bromley, 129 N. Y. S. 2d 142, modified in part on other grounds, 283 App. Div. 698, aff'd 306 N. Y. 421 17
Cole, Matter of; Matter of United States v. Franklin National Bank, 342 F. 2d 5, Cert. Den. 381 U. S. 950 .. 17

Flannery, Matter of, 212 N. Y. 610 21
Foster v. United States, 265 F. 2d 183, Cert. Den. 360 U. S. 912 17

Gehr v. Board of Education, Matter of, 304 N. Y. 436 .. 11
Goodman, Matter of, 199 N. Y. 143 21
Gould, Matter of, 4 A. D. 2d 174 13

Haynes v. State of Washington, 373 U. S. 503 11
Healy, Matter of, 11 A. D. 2d 4 16

Konigsburg v. State Bar of California, 366 U. S. 36 11

Lane v. Johnson, 283 N. Y. 244 14
Lathrop v. Donohue, 367 U. S. 820 (Wisc. 1961), rehearing denied 368 U. S. 871 ..... 13, 14
Lynch, Matter of, 184 App. Div. 75 8

Robinson, Matter of, 209 N. Y. 354 21
Ropiecki, Matter of, 246 App. Div. 80 13
Rouss, Matter of, 221 N. Y. 81, 84 13

Schware v. Board of Examiners, 353 U. S. 232 11

United States v. Franklin National Bank, Matter of; Matter of Cole, 342 F. 2d 5, Cert. Den. 381 U. S. 950 .. 17
Upham's Income Tax, In re, 18 F. Supp. 737 (S. D. N. Y.) 17

PAGE

Weil et al. v. New York State Commission to Investigate Harness Racing, 128 N. Y. S. 2d 874, 880, modified in part on other grounds, 283 App. Div. 808 17-18
Willner v. Committee, 373 U. S. 96 11

STATUTES CITED:

Civil Practice Act, Section 411 18
Judiciary Law, Sections 90 (2), (6) and (7) 11, 12, 21
New York Penal Law, Section 270 15

RULE CITED:

Rule 12, Special Rules Regulating the Conduct of Attorneys, Appellate Division, First Department 13, 14, 17, 18

BLANK
PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1223

In the Matter

—of—

RICHARD HOWARD JONES, An Attorney,

Respondent-Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Pursuant to Rule 16, subdivision 1, of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss appellant's appeal from the New York Court of Appeals to this Court in the above entitled action on the grounds that (1) the appeal is not within the jurisdiction of this Court, because not taken in conformity to Revised Rule 13, subdivision 1, (2) the appeal presents no substantial federal questions and (3) the judgment rests on an adequate non-federal basis.

Preliminary Statement

In simplest outline, appellant's claims to have been subjected to unlawful search and seizure and denial of due process, in violation of his rights under the Constitutions of the United States and State of New York, are predicated upon the following facts: Appellee, in investigating seven complaints of professional misconduct on the part of appellant, each involving one or more checks issued by him which were returned unpaid, applied to the Clerk of the Appellate Division, First Department, who issued, pursuant to the Special Rules of that Court, subpoenas *duces tecum* directed to the banks involved, requiring them to produce transcripts of relevant accounts of appellant and lists of any returned checks drawn thereon. Such subpoenas were returnable before appellee's Committee on Grievances on dates the Committee was in session. Each subpoena bore a notation that the records called for might be furnished by mail in advance, in lieu of personal appearance on the return date. The subpoenas were duly served and, with one exception, complied with. In the exception, the bank was unable to comply at the time because its records were in process of transfer but subsequently, when the proceeding was pending before the Referee appointed by the Appellate Division, compliance was effected pursuant to a further subpoena, duly served, calling for production of the same records required by the original subpoena and bearing like notation as to production by mail in advance in lieu of personal appearance on the return date. At the hearings before the Referee a representative of each of the seven banks involved appeared, produced the copy of the questioned subpoena originally served upon the bank and was examined with regard thereto. Appellant

complains that all of the original subpoenas were not maintained intact in appellee's files.

But six of the twelve charges contained in the original and supplemental petitions in this case related to the practice of issuing worthless checks. The remaining six charges concerned conversions of sums received on behalf of clients (2 cases) or from clients for specific purposes (2 cases), issuance of specific checks to such clients in purported repayment of such sums, which checks were returned unpaid one or more times, misrepresentations, false statement to and false testimony before appellee's Committee on Grievances, undertaking to procure an out-of-state divorce for New York residents. The nature of these six charges and the extent to which they were found sustained by the Referee and by the Appellate Division appear at pages 3 to 6 of the affidavit of appellee's counsel, sworn to May 25, 1965, submitted in support of appellee's motion to dismiss appellant's appeal to the Court of Appeals, from whose order of dismissal appellant here appeals to this Court. That motion and supporting affidavit are listed in appellant's Notice of Appeal among the documents to be included in the record to be certified to this Court. Appellant's "Statement of Facts" (Jurisdictional Statement, pp. 12-16) is merely a recital of the chronology of the case below.

All page references hereafter, unless otherwise indicated, are to appellant's Jurisdictional Statement.

ARGUMENT

I.

Appellant's appeal herein is not within the jurisdiction of this Court because not taken in conformity to Revised Rule 13, Subdivision 1, of this Court.

By order dated December 13, 1965, appellant's time within which to docket his appeal to the Supreme Court of the United States, and to file a jurisdictional statement with respect to the appeal, was enlarged to and including February 12, 1966. The order was signed by the Presiding Justice of the Appellate Division, First Judicial Department, the Court in which appellant's Notice of Appeal to this Court was filed (pp. 22a-23a, 5). December 13, 1965, according to appellee's computation, was the sixtieth day following the filing of the Notice of Appeal (Revised Rule 34 (1)).

By order dated February 21, 1966, signed by the Presiding Justice of the Appellate Division, appellant's time to docket his appeal herein, and to file a jurisdictional statement with respect thereto, purportedly was further enlarged to and including March 31, 1966. The order recited that it was entered upon appellant's affidavit, sworn to February 14, 1966, and his counsel's affirmation, dated February 14, 1966 (pp. 24a-25a). Since February 12, 1966, a Saturday, was a legal holiday in New York and was followed by a Sunday, the recitals of the order would create the impression that the application, which was also dated February 14, 1966, was timely presented for signature. Under Revised Rule 34 (1), such application would have been timely had it been presented on February 14, 1966.

The papers submitted to the Appellate Division upon this application include a "Notice of Presentation For Signature", the body of which is as follows:

> "PLEASE TAKE NOTICE that an ex-parte Order, of which the within is a true copy, will be presented for signature to the Justices of the Appellate Division of the Supreme Court of the State of New York, First Department, at the Appellate Division Court House, East 25th Street @ Madison Avenue, New York, New York, *on the 16th day of February, 1966,* at 1:00 p.m., or as soon thereafter as counsel can be heard" (italics supplied).

Appellant's affidavit in support of the application for the proposed enlargement order alleged that the application was being made "for the reason that appellant (sic) time in which to docket the said appeal will expire this date, to wit: February 14, 1966, unless enlarged by this Court". The papers so submitted bore an affidavit of service by mail upon appellee on February 15, 1966. Appellee, however, has in its possession the envelope in which the copy served on it was received on February 16, 1966. The envelope is postmarked "FE 16 AM, 1966". Upon receipt of the copy so served, appellee served upon appellant's counsel by mail, and submitted to the Appellate Division, a memorandum calling that Court's attention to the provisions of Revised Rules 13 (1) and 34 (1) of this Court and questioning, in the circumstances, that Court's jurisdiction to sign the proposed order and grant the relief sought. Appellant filed no opposing memorandum nor, to its knowledge, was the validity of appellee's position otherwise questioned. Nevertheless, the Presiding Justice, on February 21, 1966, signed the proposed order of enlargement.

Subsequently, by order dated March 31, 1966, the Presiding Justice of the Appellate Division further enlarged appellant's time to docket his appeal, and file a jurisdictional statement with respect thereto (pp. 25a-26a). Upon receipt of a copy of the papers submitted on that application, on March 31, 1966, appellee again submitted to the Appellate Division a memorandum calling that Court's attention to Revised Rules 13 (1) and 34 (1) and questioning its jurisdiction to grant the relief sought. Again, appellant filed no opposing memorandum.

Appellee respectfully submits that appellant's application for an enlargement order, dated February 14, 1966, but presented to the Appellate Division for signature on February 16, 1966, was not in conformity to Revised Rule 13 (1) of this Court. A reading of Revised Rule 13 (1) would suggest, however, that only an application for enlargement "before the expiration of the original sixty-day period" may be presented to a judge of the Court whose decision is being appealed or in which the notice of appeal is filed and that any further such applications should properly be presented to a Justice of this Court. The latter, of course, was not here done. Under either interpretation, it is submitted, appellee has not proceeded in conformity to the Revised Rules applicable, that the Presiding Justice of the Appellate Division was without jurisdiction to make the enlargement orders, dated February 21 and March 31, 1966, and, accordingly, that this Court has not jurisdiction to entertain the instant appeal.

II.

The appeal herein presents no substantial federal questions.

The argument under this point will be directed to the contentions advanced by appellant, without numerical or other subdivision, under the heading "3. The Federal Questions are Substantial" (pp. 20-25). Such contentions will be considered in the order there set forth and will be numbered consecutively.

1. Appellant asserts that the Court of Appeals "was required to go into the merits of appellant's claim and determine whether or not the acts complained of constituted a breach of mandatory duty, or such denial of fundamental 'due process' as to compel the Court of Appeals to review the Appellate Division's order." He complains that no opinion was rendered as to why the constitutional questions raised were not substantial (p. 20). In reaching its determination that "no substantial constitutional question is directly involved" and dismissing appellant's appeal thereto (pp. 1a, 2a), the Court of Appeals cannot be presumed not to have considered the grounds for appeal urged, which were substantially as here urged. The fact that that Court rendered no lengthy or formal opinion is not evidence to the contrary. It is submitted that this point of appellant is without merit.

2. As "One of the first violations of the 'due process' clause", appellant next asserts that the Appellate Division reversed the Referee and reinstated two charges that the Referee had "dismissed at the end of the appellee's case, and in which the appellant did not testify because of the referee's rulings" (pp. 20-21). Appellant states that "Al-

though the Appellate Division reinstated the charges, it afforded the appellant no further opportunity to testify with respect to them". Appellant identifies the charges referred to as those relating to William Newsome and to The Carry-On Club, which the Appellate Division found fully sustained. Citing cases, appellant declares that it is "academic in law, that in a reversal of a nonsuit, a new trial must be ordered". To this contention appellee has several rejoinders.

The Referee did not "dismiss" any charges. Indeed, he had no power to do so. *Matter of Lynch,* 184 App. Div. 75 (1st Dept., 1918). He did find certain charges in part "not sustained". As appears at page 5 of the affidavit of appellee's counsel, sworn to May 25, 1965, in support of appellee's motion to dismiss appellant's appeal to the Court of Appeals herein (hereinafter referred to merely as Affidavit), which has been designated by appellant to be certified as part of the record presented to this Court, in the *Newsome* case, in which it was charged that appellant (1) commingled and converted the proceeds of a sale of real property in which he represented William Newsome, the seller, (2) misrepresented to the client that such proceeds had not been received, (3) subsequently issued to the client, in purported payment of the client's share, a check which was returned unpaid because of insufficient funds and (4) misrepresented to the client that a broker's $50 fee had been paid by money order when in fact appellant had issued to the broker his $50 check which was returned unpaid, the Referee found the charges sustained in every particular except conversion, as to which he stated on the record he would find that charge "not sustained because again it connotes some possible criminality which I do not

choose to make a finding with respect to" (Referee's Minutes, pp. 1328-1329). As stated, the Appellate Division found the charge fully sustained. Appellant does not advise this Court that his testimony regarding the *Newsome* charge covered forty-nine (49) pages of the record (Referee's Minutes, pp. 1278-1327). To tell this or any Court that the Referee dismissed the charge at the end of the appellee's case is, to say the least, not candid. Nor is it candid, in appellee's view, by means of the technically true but deceptive phrase that the Appellate Division afforded him no "further opportunity" to do so, to create the impression, as appellant does, that he was deprived of an opportunity to testify regarding the *Newsome* charge.

As appears at pages 5-6 of the same affidavit of appellee's counsel, in the *Carry-On Club* case appellant was charged with (1) having deposited in his own account a $200 check received from this client for payment of a statutory fee required for licensing as an insurance premium finance agency and (2) when notified that the client did not desire to pursue the matter and return of the license fee was demanded, having issued to his client a $200 check which was twice returned unpaid because of insufficient funds and was replaced with a like check, drawn on a different bank, which also was returned unpaid because of insufficient funds. At the hearings, the Referee announced that because of the witnesses' uncertainty as to the place and notice of meetings and whether appellant had carried out his commitments, he would find that part of the charge not sustained; as to the returned checks, however, he left the charge open. Appellant thereupon elected not to testify regarding the charge. Later, as regards appellant's unpaid checks to the client, the charge was found sustained as part of the "bad check" charges. The Appellate Division, having before it

the client's $200 check, in which the name of the payee was left blank when issued to appellant, and other documentary evidence as well as the testimony in that regard, found the charge sustained in full. There was, therefore, no "reversal of non-suit".

It may here be noted, in passing, that appellant does not make the same argument with respect to two other instances in which the Appellate Division "reversed" the Referee: In the *Cheeseboro* case, which involved an alleged conversion of $500 received in settlement of a client's claim and the issuance to the client of two checks in purported payment thereof which were returned unpaid, the Referee declined to find conversion because it imported criminality (Affidavit, p. 3). In the so-called *White-Delaware County* case, which involved appellant's alleged (1) conversion of $100 delivered to him by the client, Mrs. White, for payment of the balance of delinquent taxes in connection with the revesting of title to property, (2) insurance of a worthless personal $100 check to the County authorities in purported payment of such balance, (3) ignoring communications from such authorities regarding payment of appellant's protested check, (4) false statement in a letter to counsel for appellee's Committee on Grievances, and false testimony before the Committee on Grievances, that return of appellant's $100 check was caused by refusal of payment of a third party's check, received from the client, (5) failure, as of November 30, 1960, to pay or communicate with the Delaware County authorities and (6) failure to respond to a communication from counsel for the Grievance Committee, the Referee also declined to find conversion or that appellant submitted a false statement or testified falsely, as charged, because it imported criminality

(Affidavit, p. 4). In both instances the Appellate Division found the charges sustained in full.

Appellant appears to regard the reports of the hearing officer, the Referee, as the equivalent of a final order from which an appeal was taken, and the Appellate Division's decision and order as a modification or reversal, in the course of which new facts were found. Such, of course, is not the fact. Moreover, the hearing officer's reports were in no way binding upon the Appellate Division, which was required itself to determine whether the charges were sustained. *Matter of Broome,* 13 A. D. 2d 657 (2nd Dept, 1961, reversed on other grounds 10 N. Y. 2d 942; other citations not applicable). See also *Matter of Gehr* v. *Board of Education,* 304 N. Y. 436 (1952); *Bannon* v. *Bannon,* 270 N. Y. 484, 492-493 (1936).

The cases cited by appellant in support of his argument in this regard, in appellee's view, will be found inapplicable. *Willner, Schware* and *Konigsburg* involved the constitutional sufficiency of proceedings below in which admissions to the Bar had been denied; *Haynes* involved the validity of a conviction upon a confession held to have been not voluntary. Appellee submits that the point raises no substantial federal question.

3. Appellant next questions whether or not the delegation by the Appellate Division to appellee of some of its powers under Sections 90 (2), (6) and (7) of the New York Judiciary Law is unconstitutional (pp. 21-22). Appellant asserts that "to remove an attorney, the appellee would impose a rule that requires an attorney to answer and defend a number of charges, not related to his moral character and fitness to practice, but all bearing upon whether or not he has committed some specific acts of

alleged misconduct." He complains that "he is not even apprised of the fact that the central issue is not 'guilt or innocence' with respect to the specified charges, but his 'fitness to continue' in practice" and that "Consequently, he is afforded no plenary hearing on the issue, and is not confronted by those accusing him of lack of good moral character" (p. 21).

The contention that the Appellate Division has delegated to appellee some of its powers under the cited sections of the Judiciary Law falls of its own weight. The power which the Legislature extended to the Appellate Division to appoint prosecutors and to provide for reimbursement of the costs and disbursements incurred in prosecuting disciplinary proceedings, including the expense of any preliminary investigation, clearly does not constitute a delegation to anyone of any of the Court's authority to deal with or impose discipline, where required, upon any member of the Bar. Appellee's function is merely to conduct a preliminary investigation, prefer charges where warranted and prosecute the same in the courts, subject to all statutory or other regulations or limitations applicable to all litigants. It has and exercises no judicial power. The argument is without merit.

Similarly, appellee imposes no rule. Although stated in the abstract, appellant asserts that he has here been required to answer and defend charges, not related to his moral character and fitness to practice but "bearing upon whether or not he has committed some specific acts of alleged misconduct". His attempted distinction provides deep insight into his character and sense of moral values. To contend that commingling and conversion of clients' funds and the issuance of more than 140 worthless checks, as found by the Appellate Division (pp. 4a-5a), have no

relation to moral character and fitness to practice, is absurd. The argument requires no further consideration.

Appellant's complaints that he was not apprised that his fitness to continue in practice was in issue and was not confronted by those accusing him of lack of good moral character are equally without merit. Virtually fifty years ago, Mr. Justice Cardozo, then speaking for the New York Court of Appeals, wrote:

> "Membership in the bar is a privilege burdened with conditions. A fair private and professional life is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards (citing cases). Whenever the condition is broken, the privilege is lost . . ." *Matter of Rouss*, 221 N. Y. 81, 84 (1917).

The Appellate Division has repeatedly held that the purpose of a disciplinary proceeding is not solely discipline or meting out punishment but concern with the fitness of an attorney longer to practice the profession. See *Matter of Ropiecki*, 246 App. Div. 80 (4th Dept., 1935); *Matter of Gould*, 4 A. D. 2d 174 (1st Dept., 1957). Appellant, as an attorney, should have been so aware, if he was not. As for confrontation, appellant's accusers were the facts of his own making. His contention that his constitutional rights were invaded when afforded no plenary hearing on his fitness to continue in practice raises no substantial federal question.

4. In support of his assertion that Rule 12 of the Special Rules Regulating the Conduct of Attorneys of the Appellate Division, First Department, is a statute for all intent and purposes and has the effect of an act of the legislature, appellant cites *Lathrop* v. *Donohue*, 367 U. S. 820 (Wisc. 1961), rehearing denied 368 U. S. 871, wherein this Court

so viewed an order of the Supreme Court of Wisconsin establishing an integrated State Bar and providing for the payment of annual dues (p. 22). The order there involved and Special Rule 12 are readily distinguishable. Special Rule 12 is no more than a direction to the Clerk of the Appellate Division to issue a subpoena in the name of the presiding justice in aid of a preliminary disciplinary investigation upon application of any of the bar associations named or on the part of an attorney under such investigation. It is not mandatory and becomes operative only when invoked by a qualified attorney or bar association. *Lathrop,* therefore, is not authority for the proposition for which cited.

Appellant further asserts that appellee's charter and by-laws are similarly situated. That, of course, is not the fact and *Lathrop* cannot be construed as so holding. Even were Special Rule 12 and appellee's constitution and by-laws statutory in effect, as claimed, the extent to which they entered into the instant proceeding would not, as hereafter shown, provide any basis for appellant's argument that they were unconstitutionally employed.

Appellee is at loss to comprehend the purpose of appellant's citing *Barrows* v. *Johnson,* 346 U. S. 249 and *Lane* v. *Johnson,* 283 N. Y. 244 "as to unfairness and corruption of officers in performance of administrative functions in civil or criminal cases in state court, in violation of the 14th amendment" (p. 22). Not only do these cases not stand for the propositions attributed to them by appellant but there is no occasion for the offensive suggestion that appellant here has been subjected to "unfairness and corruption" on the part of those charged with prosecuting the instant proceeding.

5. Appellant urges that the charge "engaging in the practice of issuing worthless checks" is vague, that the case law in the First Department is such as to preclude any defense thereto and, therefore, that the charge fails to meet the requirements of due process (p. 22).

Actually, appellant was not so charged. The petitions containing bank charges alleged merely the number of checks returned unpaid. Appellant's answers acknowledged that some checks were returned unpaid and alleged mitigating circumstances, including payment and post-dating. The finding of the Appellate Division that appellant engaged in the practice of issuing worthless checks (p. 5a) is a conclusion based on the facts established at the hearings.

Assuming appellant were so charged, however, it is submitted there would be no vagueness present which would invalidate it constitutionally. "Practice" is a common word, in ordinary usage. Section 270 of the New York Penal Law, for example, provides, in part "It shall be unlawful for any natural person to practice or appear as an attorney-at-law . . . or to hold himself out to the public as being entitled to practice law as aforesaid . . . ". Appellant, as a lawyer, if not otherwise, should fully understand the meaning of the word. Although he claims to have received no guidance from the Referee (p. 17), the record reflects the following (Referee's Minutes, p. 1133):

> "MR. JONES: That is specifically what I refer to. What constitutes a practice? What constitutes all of the things that are alleged there? There is no definition and we find no cases on it.
>
> THE COURT: 'Practice' is a word which I imagine you understand. It is a course of conduct, in other

words, in the broad sense, over more than a period of a day, covering some appreciable time.

I would not want to define or limit the period, but that is the connotation it has to me.

If you quarrel with that, I would be glad to hear from you.

MR. JONES: That helps, your Honor".

The primary definition of "practice" ("practise") in Webster's Universal Unabridged Dictionary is:

> "To do or perform frequently, customarily or habitually; to perform by a succession of acts; as to *practise* gaming; to *practise* fraud or deception; to *practise* the virtues of charity or benevolence; to *practise* hypocrisy."

To have issued over a period of time in excess of 140 checks which were returned unpaid either because of insufficient funds or because the accounts were closed (p. 4a) would appear to satisfy the definition fully, just as it eliminates the possibility of mistake or inadvertence. Furthermore, it is not true that there is no defense to a 'bad check' charge. *Matter of Healy,* 11 N. Y. 2d 4 (1st Dept. 1960), merely excluded payment and post-dating as defenses. No other legitimate defense is foreclosed and appellant, in his testimony by affidavit, sworn to November 6, 1963 (p. 15), advanced certain other matters in mitigation, which, obviously, neither the Referee nor the Appellate Division deemed adequate.

It is submitted that this point of appellant is without merit and raises no substantial federal question.

6. Appellant asserts that the "unreasonable search and seizure" issue raised by him is substantial (p. 23). The

main burden of his complaint in this regard appears earlier in his Jurisdictional Statement (pp. 16-17) and is, in substance, that appellee's use of subpoenas, issued pursuant to Special Rule 12, to procure bank records as to his accounts, which appellant claims were his records, without notice to him and opportunity to attack them or otherwise move to protect his interests, constituted an invasion of his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 12, of the Constitution of the State of New York. It is unnecessary here to re-state the other particulars in which he questions appellee's procedures and Special Rule 12 (pp. 16-17).

The subpoenas here involved were issued by the Clerk of the Appellate Division pursuant to Special Rule 12 and were directed to, served upon and complied with by the banks, third parties, not appellant. The records subpoenaed were clearly the banks' property, not appellant's, as claimed. *Matter of Cole et al.; Matter of United States* v. *Franklin National Bank,* 342 F. 2d 5 (2nd Circuit, 1965), Cert. Den. 381 U. S. 950; *Foster* v. *United States,* 265 F. 2d 183 (2nd Circuit, 1959), Cert. Den. 360 U. S. 912; *In re Upham's Income Tax,* 18 F. Supp. 737 (S. D. N. Y., 1937). It is clear, thus, that no unlawful search and seizure were involved. The Appellate Division, Second Department, has held similarly. *Matter of Anonymous, No. 2,* 7 A. D. 2d 735 (1958); *Matter of Anonymous No. 14,* 7 A. D. 2d 735 (1958). Even had the subpoenas been directed to appellant, unlawful search and seizure would not have been involved. *Chait* v. *Bromley,* 129 N. Y. S. 2d 142, modified in part on other grounds 283 App. Div. 698 (1st Dept., 1954), affirmed 306 N. Y. 421; *Weil et al.* v. *New York State Commission to Investigate Harness Racing,* 128

N. Y. S. 2d 874, 880, modified in part on other grounds, 283 App. Div. 808 (2nd Dept., 1954).

Appellant is critical that Special Rule 12 contains no requirement that an original subpoena with an affidavit of service be filed so as to put interested parties on notice of its issuance (p. 17). It may be noted that none of the other statutes cited by appellant relating to subpoenas (pp. 32a-35a) contain such a provision nor is it the rule generally. In any event, appellant clearly had no standing at any time to attack the validity of the subpoenas for that prerogative is reserved to the witness served (Civil Practice Act, Section 411, p. 34a). Accordingly, appellant's objection would appear moot.

It is submitted that appellant's contention that he was a victim of unlawful search and seizure and denial of due process in this regard is without merit and raises no substantial federal question.

7. Appellant asserts that "the appellee advances the theory, and the state courts agreed with appellee, that because the subpoena power was being applied against an attorney, the statutes did not have to be complied with"; also that appellee took the attitude that it was not required to comply with Special Rule 12 (p. 23). Continuing, appellant states that "there has never been any competent proof as to either the issuance or service of the subpoenas, in accordance with the statutes" and attributes to appellee an assertion that "attorneys are not privileged to raise constitutional objections to inquiries into alleged professional misconduct" (p. 24).

Little rejoinder is required. Appellee has advanced no such theory and has made no such assertion. Appellant's characterizations are a distortion of legitimate legal argu-

ments contained in appellee's briefs below. As regards the asserted absence of competent proof as to either issuance or service of the subpoenas involved, appellant omits to advise the Court that at the hearings before the Referee a representative of each bank served appeared as a witness, pursuant to subpoena, produced from the bank's files the subpoena or subpoenas originally served on the bank, proper issuance and service of which are here questioned by appellant, and, except in one instance where waived, was examined in that regard on behalf of appellant. The implication contained in appellant's criticism of the failure of appellee's then counsel, now deceased, to maintain intact "the original subpoenaes, which would have borne the court clerk's signature and seal" (p. 23) is wholly unwarranted. As testified by such counsel, the original subpoenas in every instance bore the Clerk's signature and the seal of the Court (Referee's Minutes, pp. 853-854).

Appellant's argument in this regard as well, in appellee's view, is without substance and raises no substantial federal question.

8. Appellee does not question that this Court has jurisdiction to review the order of the New York Court of Appeals *provided* the appeal is taken in conformity to the Revised Rules of this Court and *provided* the appeal raises substantial federal questions and *provided* the judgment does not rest on an adequate non-federal basis. Appellee submits that none of these conditions has here been met.

9. Appellant aserts that "What the appellee has argued and been upheld in thus far, is that its authority to keep surveillance over attorneys is unchallengeable, and that its decisions and those of the appellate division with respect to disciplining attorneys are not subject to review, except with approval of either the appellee or the appellate divi-

sion" (p. 25). The statement is unwarranted, untrue and, in appellee's view, contemptuous of the Appellate Division and *a fortiori* the Court of Appeals. Appellant has the same right of appeal as any other litigant. In pursuing that right, however, he is not entitled to exemption from the constitutional and statutory jurisdictional limitations which govern the appellate courts. Nor does the application of such jurisdictional limitations to his case constitute discrimination against him as an attorney or otherwise. Appellee submits that the appeal herein is not well founded jurisdictionally in that there is not here in fact drawn in question the validity of the state statutes asserted by appellant to be unconstitutional for the reasons assigned and that no substantial federal question is raised by this appeal.

III.

The judgment below, as to which the New York Court of Appeals entered its order of dismissal which is here on appeal, rests on an adequate non-federal basis.

As stated initially (*supra*, p. 3), the petitions herein contain twelve charges of professional misconduct on appellant's part. Of these, but six relate to the issuance of checks which were returned unpaid, which the Appellate Division found to constitute engaging in the practice of issuing worthless checks and to which appellant principally objects upon the constitutional grounds urged. As to the remaining six charges, appellant raises no question on the merits and no constitutional point, other than that raised in Question II A, which is directed to an asserted delegation by the Appellate Division to appellee of some of its disciplinary powers and questions whether an asserted failure by the Court or appellee to promulgate procedural regulations

in disciplinary proceedings constitutes a deprivation of property without due process of law (p. 9; see also p. 21). The procedures followed in preliminary investigations by appellee's Committee on Grievances are, of course, those common to every judicial or quasi-judicial proceeding and are similar to those followed herein at the hearings before the Referee. Appellant's point would appear to be immaterial, however, for subdivision 6 of Section 90 of the Judiciary Law provides that before an attorney is suspended or removed he must be served with charges and must be allowed an opportunity of being heard in his defense (pp. 28a-29a). That requirement was fully complied with here.

The charges and findings of the Referee and Appellate Division thereon, as previously stated (see pp. 8-9, *supra*), are set forth in counsel's affidavit, sworn to May 25, 1965 (pp. 3-6), which has been designated to be certified as part of the record herein. It is submitted that the charges as to the *Cheeseboro, White-Delaware County, Newsome* and *Carry-On-Club* cases alone, which have been found sustained virtually in their entirety, would suffice to support the order of disbarment entered herein. Where the Appellate Division has found an attorney guilty of gross unprofessional conduct and has decreed his disbarment, the power of review in the Court of Appeals is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it. *Matter of Flannery,* 212 N. Y. 610 (1914); *Matter of Robinson,* 209 N. Y. 354 (1913); *Matter of Goodman,* 199 N. Y. 143 (1910). Appellant has not raised any issue as to his substantive guilt of these charges but has limited his appeal to procedural matters.

CONCLUSION

Appellee respectfully submits that the appeal should be dismissed because not taken in conformity to the Revised Rules of this Court, because the appeal presents no substantial federal questions and because the judgment rests on an adequate non-federal basis.

Respectfully submitted,

JOHN G. BONOMI
Attorney for Appellee
The Association of the Bar
of the City of New York

RAYMOND P. WHEARTY
Of Counsel

May 11, 1966

BLANK
PAGE